



Comptroller General  
of the United States

Washington, D.C. 20548

REDACTED VERSION

## Decision

**Matter of:** TAAS-Israel Industries, Inc.

**File:** B-251789.3

**Date:** January 14, 1994

Jacob B. Pompan, Esq., Pompan, Ruffner & Werfel, for the protester.

Jonathan H. Kosarin, Esq., and Kevin J. Malloy, Esq., Department of the Navy, for the agency.

Stephen J. Gary, Esq., David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Where protest as initially filed asserted only generally that statements in preaward survey were incorrect and did not support determination of nonresponsibility, and detailed arguments concerning specific observations and findings in the preaward survey were raised for the first time in comments on the agency report, the detailed arguments are untimely and will not be considered.

2. Agency's determination, based on information acquired during preaward survey, that offeror lacked the understanding and capability to implement its proposed approach to meeting the specification requirements, constituted a nonresponsibility determination, not a revised technical evaluation. Agency therefore was not required to reopen discussions and request revised proposals.

### DECISION

TAAS-Israel Industries, Inc. protests the award of a contract to Metric Systems Corporation under request for proposals (RFP) No. N00383-92-R-0278, issued by the Department of the Navy's Aviation Supply Office (ASO) to

The decision issued on January 14, 1994, contained proprietary and source selection sensitive information subject to a General Accounting Office protective order. Since TAAS and ASO have waived any objection to its release, our Office determined that the entire text of the decision could be removed from the protective order, and the decision therefore appears in full.

design and produce an advanced missile launcher power supply. TAAS contends that ASO excluded it from consideration for the award on the basis of an improper nonresponsibility determination.

We dismiss the protest in part and deny it in part.

The RFP, issued in July 1992, called for the design, development, and production of an advanced power supply, designated model ECU-112/A, to replace the power supply then being used to provide electric current and target signals for air-to-air missiles--such as the Sidewinder--prior to launch. The RFP explained that while the government had developed a "brassboard" prototype of the unit, "the brassboard units have not undergone qualification testing and were not designed to satisfy the production requirements of the ECU-112/A." Accordingly, the solicitation stated that the contractor would be responsible for final design and development of a power supply meeting the specification requirements for the ECU-112/A in a fashion that would allow the production of 200 units per month.

Of the eight offerors that responded to the solicitation, only TAAS and Metric were found to have submitted technically acceptable proposals. ASO then conducted a preaward survey of TAAS to determine whether the firm was responsible. As a result of the preaward survey, which took place over a 3-day period in June 1993, TAAS was determined to be nonresponsible, and eliminated from consideration for award.

While ASO's preaward survey team verified that TAAS had the capability to produce (and in fact had produced) certain earlier power supply models, the agency concluded that the firm did not have the capability necessary to design the considerably more sophisticated and complex ECU-112/A. As indicated above, the solicitation stated that the item called for was essentially a new, advanced model whose precise design was to be provided by the contractor. Among the changes in the new model was an increase in total output power of over 200 percent. While the government had developed a brassboard prototype and supplied drawings to offerors for informational purposes, changes to the brassboard prototype were required in order to meet the specification requirements. Further, since the various design elements of the unit are interdependent, a change to one aspect of the design necessitates changes to other areas as well. Accordingly, the solicitation specifically warned offerors that "the brassboard units have not undergone qualification testing and were not designed to satisfy the production requirements of the ECU-112/A."

Nevertheless, while TAAS's proposal had not suggested undue reliance on the brassboard prototype design as the basis for the final product, engineers on the survey team concluded that the detailed on-site discussions with TAAS clearly indicated that the firm would rely primarily on that design. For example; (1) ASO noted that the TAAS team referred to the ECU-112/A procurement as a "build-to-print" effort, even though as indicated in the RFP the brassboard drawings were not adequate for the final design and production of the ECU-112/A; (2) the preaward survey report indicates that when ASO asked TAAS engineers what changes they saw as necessary for the brassboard design to comply fully with ECU-112/A specifications, TAAS responded that no changes would be required; (3) when ASO asked TAAS how it planned to test for specified operational characteristics, such as output ripple, switching spikes, output overload protection, and dynamic loading, questions that ASO's engineers expected could be readily answered by a design staff having the ability to undertake the ECU-112/A effort, TAAS was unable to provide answers; and (4) upon being taken to TAAS's power supply design testing area, agency engineers on the survey team discovered that it was not equipped with oscilloscopes or similar units, such as electronic spectrum analyzers--which the agency considered essential to test for the very low level ripple specified for the ECU-112/A--or electronic loads, necessary for testing dynamic loading. ASO observed that, although TAAS indicated it would obtain oscilloscopes if needed, the fact that such devices and electronic loads were not standard equipment in TAAS's design test facility indicated that TAAS lacked the requisite testing capability for the ECU-112/A.

ASO's engineers concluded that TAAS did not understand (1) the nature of the design challenge posed by the ECU-112/A procurement; (2) the limitations of the brassboard design, which was intended only to demonstrate the general feasibility of designing a final item that would meet the ECU-112/A performance requirements; and (3) the considerable modifications that would have to be made to the prototype. The lack of such comprehension, ASO concluded, indicated that TAAS did not have the required design skills and knowledge to produce the item. ASO thus awarded the contract to Metric (after conducting a preaward survey and making an affirmative determination of the firm's responsibility). Upon receiving the detailed findings of the preaward survey team, TAAS filed this protest with our Office.

TAAS challenges the basis for the nonresponsibility determination. As generally stated in its initial protest submission, filed on September 2, 1993:

"The protester strenuously denies the allegations set forth in the Pre-Award Survey concerning deficiencies in the TAAS technical proposal.

"Statements in the Pre-Award Survey concerning deficiencies in the technical proposal are factually incorrect and cannot reasonably support a finding of nonresponsibility."

The burden is on a prospective contractor to demonstrate affirmatively its responsibility. Federal Acquisition Regulation (FAR) § 9.103(c). In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer must make a determination of nonresponsibility. FAR § 9.103(b); All Points Int'l, Inc., B-243901, Aug. 5, 1991, 91-2 CPD ¶ 129. A nonresponsibility determination is a matter of business judgment within the discretion of the contracting officer; we generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part or a lack of any reasonable basis for the determination. Id.; Israel Aircraft Indus. Ltd., B-242552, May 10, 1991, 91-1 CPD ¶ 454.

We find no basis to question the nonresponsibility determination. TAAS's failure, as evidenced during the preaward survey, to understand the nature of the design challenge posed by the complexity and sophistication of the ECU-112/A, the limitations of the brassboard prototype design, and the considerable modifications that would have to be made to the prototype, were legitimate reasons to conclude that TAAS did not have the required design skills and knowledge to produce the item.

TAAS takes issue with specific aspects of the preaward survey team's detailed findings and the contracting officer's detailed determination of nonresponsibility. However, TAAS did not raise these specific arguments in its initial protest submission. Rather, even though TAAS had received the detailed survey and nonresponsibility information prior to the filing of its protest, it argued in its original protest submission only generally that the agency's nonresponsibility determination was wrong, without indicating which of the specific observations, findings and conclusions it believed were incorrect. Only in its comments on the agency report--filed on October 25--did TAAS present its detailed position in this regard, specifying those findings and observations with which it disagreed and explaining why it believed them to be unreasonable or insufficient to support a determination of nonresponsibility.

A bid protest must set forth a detailed statement of the legal and factual grounds of protest. Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) (1993). Where a protester, in its initial protest submission, argues in general terms that a procurement was deficient, and then, in its comments on the agency report, for the first time makes out a detailed argument specifying precisely the alleged procurement deficiencies, the detailed arguments will not be considered unless they independently satisfy the timeliness requirements under our Regulations. Julie Research Labs., Inc., 70 Comp. Gen. 158 (1990), 90-2 CPD ¶ 526; Astro-Med, Inc., B-232147.2, Nov. 1, 1988, 88-2 CPD ¶ 422.

Protests generally must be filed not later than 10 working days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). Since TAAS's detailed arguments were raised for the first time in its comments on the agency report, filed more than 7 weeks after its protest was filed, those detailed arguments are untimely and will not be considered. Julie Research Labs., Inc., *supra*; Astro-Med, Inc., *supra*. It follows that we have no basis for questioning the preaward survey conclusions or, therefore, TAAS's nonresponsibility determination.

TAAS argues that, under the guise of making a responsibility determination, the agency in fact conducted a reevaluation of its technical proposal. TAAS concludes that the agency was required to advise TAAS of the newfound deficiencies through discussions and provide it an opportunity to correct the deficiencies prior to making award.

This argument is without merit. Technical merit or acceptability concerns an assessment of whether an offeror's approach to satisfying the RFP requirements is worthy of a particular relative rating or is adequate to meet the RFP requirements. In contrast, responsibility involves an assessment of an offeror's ability to perform in accordance with the terms of its proposal and involves the evaluation of information outside the proposal collected during an investigation apart from the proposal evaluation process, such as a preaward survey. See Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300. ASO concluded, not that TAAS's technical proposal was unacceptable (the agency never changed its evaluation of the proposal as technically acceptable), but that TAAS lacked the capability to implement its acceptable proposed technical approach, based on the information obtained during the preaward survey. While the agency took a second look at TAAS's proposal after the survey to try to reconcile its impression of TAAS's proposed technical approach with the information gathered during the survey, the agency's ultimate conclusion that the firm lacked the ability to perform as proposed

was in the nature of a nonresponsibility determination rather than a revision of the technical acceptability determination. See Litton Sys., Inc.; Varian Assocs., Inc., B-229921 et al., May 10, 1986, 38-1 CPD 448.

We dismiss the protest in part and deny it in part.

Robert P. Murphy  
Acting General Counsel